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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 460

WILLIAM J. LEARY,

Petitioner,

v.

CHICAGO TITLE AND TRUST COMPANY,

a corporation,

Respondent.

**REPLY BRIEF IN SUPPORT OF PETITION FOR
WRIT OF CERTIORARI TO THE SUPREME
COURT OF ILLINOIS.**

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SUBJECT INDEX

	PAGE
Alleged error in Petitioner's summary of the case.....	1
The issues presented by this Petition.....	2
There is an issue under the Fourteenth Amendment....	2
The Supreme Court of Illinois prevented the consideration of this issue.....	4
With denial of a right to review by the State Supreme Court, a review of this case by this Court must rest upon the action of the Appellate Court and upon the refusal of the State Supreme Court to review that action	7

TABLE OF CASES

Chicago Title and Trust Co. v. Cleary, 319 Ill. App. 83..	2
Cohens v. Virginia, 6 Wheat. 265.....	7
Dinoffria v. International Brotherhood, 399 Ill. 300.....	5
Federal Trade Commission v. Cement Institute, 333 U. S. 683.....	3
Hallberg v. Goldblatt Bros., 363 Ill. 25.....	5
Tumey v. Ohio, 273 U. S. 510	3



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COURT OF ILLINOIS.**

Alleged Error in Petitioner's Summary of the Case.

Respondent makes no objection to Petitioner's statements of fact. However, this case being one dealing with an intermediate court of review, with three divisions, and the Third Division being the one from which transfer of the case was sought, Respondent admits that Petitioner

states that the First Division assigns cases, but claims that by implication petitioner indicates that his motion was made to and denied by the Third Division. (Opposing Brief, p. 1). Petitioner stated in as clear language as is possible that the First Division had the authority to assign cases; that the case was assigned to the Third Division; and that a motion for reassignment was denied. Such motion was necessarily made to the First Division (Trans. Vol. III, p. 43). Respondent's statement is merely an attempt at confusion.

The Issues Presented By This Petition.

- (1) There is an issue of procedural due process of law under the Fourteenth Amendment, presented for the first time to this Court,
- (2) The Supreme Court of Illinois prevented the consideration of that issue;
- (3) The action of the Supreme Court of Illinois made that of the Appellate Court, an intermediate state court of review, controlling; and if the federal constitutional issue is to be determined, it may be upon the basis of either the action of the state Supreme Court in refusing consideration; or upon the finality of action by the Appellate Court which results from inaction of the State Supreme Court.

There is an Issue Under the Fourteenth Amendment.

The petition in this case shows without denial that the Third Division of the Appellate Court to which this case was assigned had two members, one of whom was of opinion that Cleary had no case, and the other of whom wrote the opinion in the previous second review of the case. A reading of that opinion and of the one here at issue is of importance. (*Chicago Title and Trust Company v. Cleary*, 319

Ill. App. 83; Transcript, Vol. III, p. 5). The expression by one of the judges that Cleary had no case was previously quoted (Petition, p. 14). The Respondent's statement (previously quoted) was that the two members of the Court should serve again because they "are already familiar with the facts in this case and its history in the courts." From the standpoint of Respondent it was even more important that points of view were already reached. It is true that dishonesty and unfairness were not charged in the affidavit supporting the motion for transfer of the case (Transcript, Vol. II, p. 1168) because of the fact that such judges did not make the assignment to themselves, even though they may have had established views in the case.

Petitioner called attention to the fact that the case of *Tumey v. Ohio*, 273 U. S. 510 does not apply to this case (Petition, p. 18). Respondent alleges that Petitioner relies upon the *Tumey* case, and itself relies upon a quotation from the recent case of *Federal Trade Commission v. Cement Institute*, 333 U. S. 683 (1948) that "it would not be a violation of procedural due process for a judge to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law." Respondent relies upon this and upon cases supporting this view. (Respondent's Brief, p. 4). Petitioner agrees with this view, but asks this Court if it would take the same position as to a judge who had previously expressed an opinion that one of the parties had no cause of action (Petitioner's Brief, 14), under the facts of the case. Respondent seeks to meet this situation by saying that the judge merely expressed a view of the law, but his expression went far beyond this (Opposing Brief, p. 3).

This issue presented itself in the Appellate Court for the first time.

The Supreme Court of Illinois Prevented the Consideration of This Issue.

That this Court normally follows the highest state court in its construction of state constitution, state statute and rules of state courts, is well established, and is not subject to attack by petitioner. This does not mean, however, that a construction or application thereof may be employed to defeat a right under the constitution of the United States.

The federal constitutional issue rose for the first time in the Appellate Court. If the Supreme Court of the State had jurisdiction of the matter, there was a right and a duty to seek determination by that Court before applying to this Court. Two methods of review are provided: (1) a petition for leave to appeal and (2) writ of error. One (petition for leave to appeal) is discretionary and infrequently granted; the other a matter of right if the issue is in the case. There being a constitutional issue first arising in the Appellate Court, writ of error was sought within the time specified and in accordance with a rule of the Court which is found on pages 8-9 of the Petition. There is no claim of violation of this rule, although it was found desirable by Respondent to make a false statement under oath that Petitioner's abstract of record erroneously specified the date of issuance of writ of error. The affidavit and the file of the Clerk of the Supreme Court of Illinois do not agree (Transcript, Vol. III, pp. 3; 41; 50).

Writ of error, if authorized, was filed within proper time. A motion to dismiss was filed by Respondent, on the grounds that writs of error did not apply and that filing was not within the time required for a petition for leave to appeal. Without specifying the ground therefor, the Supreme Court of Illinois granted the motion and dismissed the writ of error (Transcript, Vol. III, pp. 46-47).

The primary ground relied upon by Respondent is that writ of error did not apply to a federal constitutional issue arising in the Appellate Court unless it involved the validity of an Illinois statute. Petitioner cited several cases which he regards as contrary to this view (Petition, 7). Respondent says that "the term 'constitutional question' as used in those cases refers only to the validity of an Illinois statute." (Respondent's Brief, 12). It is for this Court to determine the meaning of the following quotation from *Hallberg v. Goldblatt Bros.*, 363 Ill. 25, the case which appears to have been most quoted and most relied upon by Respondent:

"But we held that this court's jurisdiction of cases involving the validity of statute is conferred by section 11 of article 6 of the constitution and not by statute. We also held that the judgment of the Appellate Court on a constitutional question which had been raised there for the first time was subject to writ of error in this court." (p. 29, italics added).

The words "also held" would normally be construed to mean something in addition to statutes.

In the case of *Dinoffria v. International Brotherhood*, 399 Ill. 300 (1948), a case on writ of error and not involving the validity of a statute, the Illinois Supreme Court said, at page 307:

"The right of this court to review the constitutional question first arising when the judgment of the Appellate Court is entered is well settled, even though the questions arising thereon are not raised in that court."

The Supreme Court of Illinois does not obtain this jurisdiction from the state constitution, but from the statutes as it has construed them, and the forty-day period is in

terms limited to petitions for leave to appeal, with the time required for writ of error provided by a rule which is printed on pp. 8-9 of the Petition. There is no denial of Petitioner's compliance with the requirements of this rule. There can be no doubt of the jurisdiction of the Illinois Supreme Court, and its dismissal of writ of error in this case can only be regarded as a final disposition of the case which lays the basis for a writ of certiorari from this Court.

All requirements of court rules with respect to writ of error were met by petitioner. The Respondent says that the "petitioner not having availed himself of a review of the alleged merits of his cause by the Supreme Court of Illinois, he has no standing in this court." (Respondent's Brief, 12). But the Supreme Court of Illinois did not permit petitioner to avail himself of a review of merits of his case. It rejected a writ of error which complied with the rules of that procedure, and which involved constitutional issues specifically within jurisdiction under its decisions.

Respondent (pages 10-11) says that in ruling on the motion to dismiss the writ of error the Supreme Court of Illinois construed the constitution, statute and the pertinent rules of that Court. Petitioner stated (page 9) and repeats that no such construction is found in the record unless Respondent accepts its motion as construction by the Court. The order of the court does not comply with Respondent's statement (Transcript, Vol. III, pp. 46-47). The order does not in any manner overrule, limit or criticize decisions rendered on the matter, and is in terms an order alone, occupying about one-third of a page.

With Denial of a Right to Review by the State Supreme Court, a Review of This Case by This Court Must Rest Upon the Action of the Appellate Court and upon the Refusal of the State Supreme Court to Review That Action.

Respondent claims that the only review by the State Supreme Court of a federal constitutional issue arising in the Appellate Court is by petition for leave to appeal. No right of review exists under the petition for leave to appeal, which lies completely in the discretion of the court; and, with this condition existing, this Court should entertain a direct application for review of the Appellate Court. Since the opinion of Chief Justice Marshall in *Cohens v. Virginia*, 6 Wheat. 265 (1821), in which the Quarterly Session Court of the borough of Norfolk was the highest court having jurisdiction of the case, this court has entertained review of the highest state court having jurisdiction, even though it may not be the state court of highest jurisdiction.

State judicial procedure is not alone involved when so construed as to permit the state supreme Court to deny consideration of a federal constitutional issue first raised in an intermediate state court. The issue becomes a federal constitutional issue, and there is a constitutional right to seek the opinion of this Court upon such an issue.

If a federal constitutional issue may be raised in an Illinois Appellate Court, but not carried of right to the Illinois Supreme Court, it must be possible to carry it from the Appellate Court to this Court, or there would be a material restriction upon this Court's jurisdiction and upon its construction of the Constitution of the United States.

It cannot be denied: (a) That a question under the Constitution of the United States presented itself to the Appellate Court; (b) nor can it be denied that Respondent claims that the Supreme Court of Illinois had full authority to refuse, and refused to consider that issue; (c) nor can it be denied that action of the Supreme Court of Illinois made the Appellate Court in fact the court of final jurisdiction.

This case involves an important constitutional issue not before presented to this Court; and, if the Supreme Court of Illinois takes the position that review may be had only at its discretion upon a petition for leave to appeal, it will have full authority to exercise that discretion in such a manner as to avoid a determination of the issue, both state and federal.

Respectfully submitted,

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